Now of course no qualities of finality ought to be attributed to such a solution. Obviously as civilization advances, the public aesthetic sense will become more and more compelling. But for the present, it is believed that restrictions only with compensation will best strike a balance of convenience between the social interest in the individual's freedom of self-assertion, and the social interest in an attractive and well-ordered community.

DATE AT WHICH RATE OF EXCHANGE SHOULD BE APPLIED. — Whenever money is due in a foreign country, whether on a note, or as damages for a breach of contract, it becomes necessary to determine its equivalent in domestic currency.[1] There was a tendency on the part of early decisions to disregard commercial rates of exchange, and make the computation on the basis of the nominal par value of the two currencies,[2] determining this, for example, by the weight of gold in the standard coin of each country. Fortunately, the law increasingly adapted itself to the custom of trade, and it became established that commercial rates of exchange would be followed.[3] But the courts had their attention centered on upholding commercial exchange as against conversion at the nominal par, rather than on the question of the precise date at which the rate should be taken. In general, England adopted the date of breach,[4] and the United States that of judgment,[5] though it often is not apparent, in the early decisions, which date the court regarded as decisive.[6]

To-day, however, attention is centered on this latter point, for the rate of exchange may double in the months between breach and judgment, as it did in *Di Ferdinando* v. *Simon, Smits & Co.*[7] After some vacillation,[8] England has now definitely adopted the date of breach, whether contracts or negotiable instruments [9] are involved, and regard-

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[1] This necessity is practically inherent in our judicial system. See SEDGWICK ON DAMAGES, 9 ed., § 274.

[2] Martin *v.* Franklin, 4 J. R. (N. Y.) 124 (1809); Adams *v.* Cordis, 8 Pick. (Mass.) 260 (1829); Chumasero *v.* Gilbert, 24 Ill. 651 (1860).

[3] Scott *v.* Bevan, 2 B. & Ad. 78 (1831); Marburg *v.* Marburg, 26 Md. 8 (1866).

[4] Scott *v.* Bevan, *supra.* See note 6, *infra.*

[5] Marburg *v.* Marburg, *supra.* Hawes *v.* Woolcock, 26 Wis. 629 (1870). Similarly Canada adopted the date of judgment. Crawford *v.* Beard, 14 U. C. C. P. 87 (1864). For the problem in international arbitration, see The Pious Fund of the Californias, Hague Arbitration Cases, Oct. 14, 1902. (J. B. SCOTT, HAGUE COURT REPORTS, 1; G. G. WILSON, HAGUE CASES, 1.)

[6] An interesting example of this is Scott *v.* Bevan, *supra.* It is always cited as a leading case, but sometimes on one side, sometimes on the other. Thus the Divisional Court treated it as a decisive authority for the date of judgment in Cohn *v.* Boulken, 36 T. L. R. 767 [1920 K. B.]. Two weeks later the Court of Appeals, in another case, considered it carefully, and pronounced it to be a clear authority for the date of breach. Di Ferdinando *v.* Simon, Smits & Co., [1920] 3 K. B. 409.

[7] [1920] 3 K. B. 409. See RECENT CASES, p. 435, *infra.*

[8] See Kirsch *v.* Allen, Harding & Co., [1919] W. N. 301 (King's Bench). This case was never followed, and has now been overruled by the Court of Appeals in Di Ferdinando *v.* Simon, Smits & Co., *supra.*

[9] At present there is, as to bills of exchange, an authority *contra* in Cohn *v.* Boulken, *supra.* But that decision was directly based on an interpretation of Scott *v.* Bevan now declared erroneous by the Court of Appeals. See note 6, *supra.*

less of which party is benefited thereby.[10] The American decisions point in the same direction.[11]

On theory, this seems the preferable result. The English Court of Appeals analyzes the situation as follows: (1) The general rule, apart from any question as to rate of exchange, is that the plaintiff is entitled to have his damages assessed as at the date of the breach; (2) the court has only jurisdiction to award damages in English money; (3) the judge must therefore express these damages in English money; (4) in order to do so he must take the rate of exchange prevailing at the time of the breach.[12] This accords, also, with business practice. The plaintiff, as soon as the breach occurred, had to cover himself by fresh purchases of goods or money. These would be made at the rate of exchange then prevailing.[13] Whether the rate thereafter fluctuated is another matter, and one with which the court need not concern itself.

A strong case, nevertheless, is made out by the advocates of the date of judgment.[14] On their theory, the plaintiff should recover in damages exactly the same amount which he would be entitled to recover in a suit in the foreign country; and there the fluctuations in the rate of exchange are necessarily immaterial. Thus if the plaintiff were entitled to one thousand pounds in 1919, an English court could give him only one thousand pounds in 1920, regardless of the value of the pound in New York. But the English court would profess to give damages as they accrued in 1919, and it seems unnecessary that the American court should be bound by English limitations on the accurate determination of these damages. It is true that a court will not consider fluctuations in the purchasing power of its own currency, for that currency is itself the measuring rod for values, and the court has no extrinsic standard by which to judge it. But if this same court has before it a foreign contract, payable in foreign currency, it can regard that currency as objectively as if the contract called for payment in so many bushels of corn, instead of in so many francs. If the contract called for corn, the court would take the value of the given amount of corn as it stood at the time of the breach, regardless of subsequent fluctuations. Foreign currency should be handled on the same basis, if we are really to give damages as they accrued on the date of breach.[15]

[10] The adoption of the date of breach benefited the plaintiff in Di Ferdinando *v.* Simon, Smits & Co., *supra*. The defendant was benefited in: Barry *v.* van den Hurk, [1920] 2 K. B. 709; Lebaupin *v.* Crispin, [1920] 2 K. B. 714.

[11] Simonoff *v.* Granite City National Bank, 279 Ill. 248, 116 N. E. 636 (1917); Pavenstedt *v.* New York Life Ins. Co., 203 N. Y. 91, 96 N. E. 104 (1911); Gross *v.* Mendell, 171 App. Div. 237, 157 N. Y. S. 357. See 29 HARV. L. REV. 873. See also Rasst *v.* Morris, 108 Atl. 787, 790 (Md.) (1919).

[12] Di Ferdinando *v.* Simon, Smits & Co., *supra*.

[13] See The Volturno, [1920] P. 447.

[14] See STORY, CONFLICT OF LAWS, § 310. The cases generally use the expression "date of judgment" to cover either that date, or the date when suit was brought, overlooking the distinction between the two. The strongest case against the date of breach would seem to arise when that breach occurred in the foreign country, but this point is not taken by the courts. Examples of adherence to the date of breach even though that breach occurred abroad, are: Gross *v.* Mendel, *supra*; Barry *v.* van den Hurk, *supra*.

[15] See Manners *v.* Pearson & Son, [1898] 1 Ch. 581, 593. The statement of the law in the dissenting opinion of Vaughan Williams, L. J., was adopted by the court in Di Ferdinando *v.* Simon, Smits & Co., *supra*.

The present rule of computing the exchange at the date of breach seems a correct solution of this long disputed point.

HOW FAR MAY LEGISLATURES REGULATE JUDICIAL PROCEDURE. — Judicial reformers who advocate the regulation of judicial procedure and practice by the courts rather than by the legislatures[1] have found a staunch ally in the Supreme Court of Indiana. The rules of that court required the briefs of counsel to contain concise statements of the errors and exceptions relied upon. The State Legislature enacted a provision which abrogated this rule.[2] The court held that act unconstitutional.[3]

A legislature has great latitude in determining the rules of procedure of those courts that owe their existence directly to the legislature.[4] It is not logical to conclude therefrom that a legislature has such wide power over a court that owes its being to that instrument responsible for the legislature itself.[5] Federal and state constitutions generally establish courts with jurisdiction in law and equity. The scope of that jurisdiction over judicial procedure must be determined in the light of the common law and the history of the courts anterior to and at the time of the adoption of the constitution.[6] History reveals that, at least as far back as the days of Richard II, rules of procedure had been adopted by the judges.[7] But the judges did not exclusively control their procedure, for we find Parliament[8] also regulating the procedure of the courts. This system of dual control over procedure existed when our Constitution adopted the theory of the separation of powers.[9] Indeed the Supreme Court of the United States[10] has recently recognized the inherent right of the courts to regulate judicial procedure, at least in the absence of contrary legislation. Yet neither the federal nor the state constitutions expressly provided for a mode of adjudicating the conflict that might ensue between the two departments on a question of judicial procedure.

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[1] See Roscoe Pound, "Regulation of Judicial Procedure by Rules of Court," 10 ILL. L. REV. 163; Elihu Root, Address in the REPORT OF NEW YORK STATE BAR ASSOCIATION, xxxiv, 87.

[2] See 1917 IND. ACTS, c. 143, § 3. See IND. CONSTITUTION, Art. III, § 1, and Art. VII, § 1.

[3] Epstein *v.* State, 128 N. E. 353 (1920). See RECENT CASES, p. 434, *infra*.

[4] See UNITED STATES CONSTITUTION, Art. III, § 1. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." See also PA. CONSTITUTION, Art. V, § 1; Wilbur Larremore, "Regulation of Contempt of Court," 13 HARV. L. REV. 615, 619; WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, 1270.

[5] See WIS. CONSTITUTION, Art. VII, § 2. See ILL. CONSTITUTION, Art. III, "The powers of the government of this State are divided into three distinct departments, — legislative, executive, and judicial; and no person or collection of persons, being one of these Departments, shall exercise any power properly belonging to either one of the others."

[6] See State *v.* Harmon, 31 Oh. St. 250, 258 (1877).

[7] See TIDD'S PRACTICE, 8 ed., xxxvii–l; Preface to TIDD'S PRACTICE, 3 ed., ix, x. See also Pound, *supra*, 171.

[8] See TIDD'S PRACTICE, 8 ed., xxiii-xxxvi.

[9] See Roscoe Pound, Address in the OHIO STATE BAR ASSOCIATION, xxxvi, 34.

[10] See *In re* Peterson, U. S. Sup. Ct., October Term, 1919, No. 28.